No. 01-1806

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In The

Supreme Court of the United States

JAMES E. RYAN, ATTORNEY GENERAL OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF *AMICUS CURIAE* ON BEHALF OF HUDSON BAY COMPANY OF ILLINOIS, INC. IN SUPPORT OF RESPONDENTS

THOMAS H. GOODMAN
ANTHONY J. GLEEKEL
Counsel of Record

SIEGEL, BRILL, GREUPNER,
DUFFY & FOSTER, P.A.
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 339-7131
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

Hudson Bay Company of Illinois, Inc. ("HBC") is a for-profit fundraiser and political consulting firm which began business in the early 1970's. Its founder, Marc Anderson, was also the founder of Citizens for a Better Environment, the plaintiff who sued Schaumberg, Illinois in the U.S. Supreme Court case which bears those parties names.[2]

HBC operates a telephone canvassing center in Lincoln, Nebraska where approximately 95 canvassers make telephone calls for about 32 non-profits and candidates for public office in 44 states. These non-profits advocate various environmental, consumer, civic, political, and social causes. The greatest number of HBC's callers are undergraduates or graduate students, most commonly in political science or international relations, at the University of Nebraska. HBC also operates phone canvass centers in New York City, Cleveland, Tampa and Indianapolis, as well as door-to-door "field" canvasses in twelve other States.

Many present and former HBC clients are household names, including:

- Michigan and Colorado Clean Water Action
- Former U.S. Senator Paul Wellstone

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its counsel, or its members made a monetary contribution to the preparation or submission of this brief.

[2] *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620 (1980).

- Ohio Civil Liberties Union
- National Abortion and Reproductive Rights Action League, for Michigan, Ohio and Georgia
- Ohio Citizen Action
- Florida Consumer Action Network
- Government Accountability Project
- Defenders of Wildlife, New York
- Organic Consumer Association
- Minnesota Civil Liberties Union
- Two Michael Dukakis for President Political Action Committees
- Florida National Organization for Women
- Congressman Mark Udahl
- New York and Texas Citizens Campaign for the Environment
- Michigan Consumers' Federation
- Colorado Gubernatorial Candidate Rollie Heath
- Sierra Club, Dakota Chapter
- Many others

HBC offers a menu of services to these candidates and organizations, including:

- Database Management Printing – Production of mailing labels
- **Voter Identification Surveys**
- Door-to-door canvassing
- **Fundraising**
- Hiring and training advice
- **Public education on client issues**
- **Alerting clients' members to contact legislatures or other government officials on pending issues**
- **Membership Drives**
- **Get-Out-The-Vote drives**
- **Membership and donor renewal**
- Media relations
- Job placement
- Speech and op ed writing
- Mailing

Six of these services, highlighted in bold above, rely primarily on one-to-one telephone contact. HBC telephone canvassing often involves fundraising, but not always. Each client's telephone canvass usually has several goals. Fundraising is often, but not always, one of them. For example, clients hire HBC to conduct voter identification surveys, get-out-the-vote drives, membership renewal, and to urge members to contact legislators on issues important to the client and its members and donors. The cost of calling for these purposes is frequently defrayed by a solicitation for funds as well, but sometimes, as in an emergency, there may just not be time for the fundraising message in the call or the fundraising may just not be worthwhile, given the nature of the audience to be canvassed.

In 30 years of activity of this kind, HBC has never been accused of fraud. But HBC recognizes the need, as well as its self-interest, to prevent fraud in connection with fundraising.

Despite being technically "for profit," HBC has never paid a dividend and its books are open to all of its clients and any of their members who may wish to examine them. For the past 14 years, the president and part owner of HBC has been Dave Anderson, Marc Anderson's brother. Before that, for 21 years, Dave Anderson was a political reporter and assignment editor at newspapers in Minneapolis, Detroit and Chicago. He was managing editor of the Chicago Journalism Review, co-author of the First American textbook on investigative reporting and has been an expert witness on media ethics and practices in Minnesota and Michigan. He served four years on the Bio-Medical Ethics Committee at the University of Minnesota Teaching Hospital and has served for two years as a member of the

Human Subject Trials Committee at the University of South Florida School of Medicine.

Anderson and the other two owners of HBC, who have decades of experience at this, are primarily political junkies. They do not look for or accept any sales business, or even charity work. HBC just does politics. And no one gets rich from HBC's work.

HBC is now faced with the prospect for all of its clients of having to calculate and defend the statistic at issue in this case – the ratio of the fees and costs of the telephone canvassing as a percentage of the total amount raised for a client. This costs of funds ratio or "CFR" is admittedly widely, but wrongly, considered to be a meaningful statistic. Many states require that the CFR be calculated, kept, reported or disclosed, even though its worth as a measure of fundraising efficiency was thoroughly and quite properly discredited in *Riley v. National Federation for the Blind of North Carolina, Inc.*[3]

Is it a fraudulent omission for professional fundraisers who advocate for environmental, consumer, civic, political, and social causes to fail to disclose a CFR? After 30 years and literally millions of calls for thousands of clients, HBC has a strongly-held view on this question.

[3] See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

SUMMARY OF ARGUMENT

No fundraiser should be compelled to disclose a CFR because: (1) fundraisers often can't disclose it – they don't or can't know it, (2) the CFR is at best irrelevant and at worst misleading, (3) any government right to make *post hoc* determinations that telephone calls should have included governmentally chosen disclosures has an unnecessary and unconstitutionally chilling effect on the legitimate exercise of First Amendment rights, and (4) the government is not a simple neutral guardian of consumers when it comes to fully protected speech; it is often actively involved with its own political view or even as the target of the speech, and it should not be allowed selectively to punish callers for omitting facts it chooses retroactively for importance.

ARGUMENT

1. Fundraisers Often Don't Know Or Can't Know Their CFR.

Start-up organizations have a host of initial obstacles. Whom to contact? How to get names? How to make contact with people? How to pay for everything? Who will help? These questions rarely have an easy answer. There is no master bulletin board for the whole country.

Assume you sincerely wish to start a new organization to help the Kurds in their struggle to establish an independent, sovereign Kurdish homeland. You must incorporate, hire an executive director, lease premises, develop literature, lobby public officials, etc.

Now assume you have hired very efficient and honest fundraisers who tell you that in order to spread the word on this topic and raise funds for the effort, it will cost, on average, two dollars per call to contact people by telephone (far cheaper than a mailing) to ask them to be members of the organization. What will be your CFR? What would you tell people it is?

Obviously, you cannot know the CFR until after the effort has progressed awhile, the public sympathy for the cause is discovered, and the denominator of the ratio – the gross receipts from fundraising – can be determined.

At the beginning of the effort, of course, all the funds received are used to build infrastructure, buy stationery, produce literature, and generally get the word out. Moreover, at first most of the calls will be unsuccessful at building membership and fundraising. The CFR for the first month will, no doubt, be greater than 100%; it almost always is. That means more is spent on calling than comes in from calling. But you persist.

Eventually, your perseverance would be rewarded. You would be calling mostly committed members, former contributors, and their friends who have heard of and trust your maturing organization. From the calling, you now receive just enough to pay the costs of hiring the callers and pay the other expenses, such as telephones, computers, and the like.

You would be delighted to have achieved a self-funding way of spreading sympathy for the plight of the Kurds. But not so fast. Now that you have been operating a while, you must worry about what mandatory CFR disclosures you might have to make on penalty of fraud for the omission. Should you be warning people in each call

that some large percentage (in this example 100%) of what they donate is "kept" by the fundraisers?

So, you undertake to "warn" respondents about this high CFR in the calling. Upon examination to perform the CFR calculation, you would discover that, in fact, when the organization had a small surplus from the calling it decided to use that surplus to try to build even a larger membership, so it used the funds for still more calling. You would realize that any surplus goes for the calling, and it always will, at least until the Kurds have their own government.

Your CFR is 100%. Calling people to spread the word about the plight of the Kurds is the whole point here. The more successful the organization, the larger the dollars involved, the more fraudulent the large CFR seems. And no one trusts a fundraiser who "keeps" all the money.

So, you decide to create a numerator for the CFR. After all, some portion of the funds are going not just for fundraising but for the purpose of the calling, membership, public awareness and the like. Shouldn't that portion be the numerator if that is what the organization is all about? Okay, how much?

This exercise is not just theoretical. Official governmental forms and statutes still routinely require HBC to engage in this exercise or similar ones, on penalty of perjury, fines, and imprisonment.[4] To complete forms that

[4] Ala. Code §§ 13A-9-70-13A-9-84 (1996); Alaska Stat. §§ 45.68.010-45.68.900; Ariz. Rev. Stat. §§ 44-1271-44-1280; Ariz. Rev. Stat. §§ 44-6551-44-6561; Ark. Code. Ann. §§ 4-28-402-4-28-416 (1999); 1999 Ark. Acts 1198; Cal. Bus. & Prof. Code §§ 17510-17510.95 (1980); Colo. Rev.

(Continued on following page)

require a CFR, HBC has resorted to using observers with stopwatches and clipboards who attempt to time the various topics discussed during the calling. Quite honestly, it's a stupid requirement; there is really no way to measure a CFR in this type of situation, but no non-profit wants to direct its donated funds to litigate the question state-by-state to the exclusion of its stated mission.

Moreover, the CFR for an organization can vary greatly from month to month or year to year. One year the organization may tell its communications people to make fundraising the top priority. At other times it may want to emphasize membership at the expense of fundraising. The

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Stat. §§ 6-16-101-16-16-113; Conn. Gen. Stat. §§ 21a-175-21a-1901 (1983); Fla. Stat. Chs. 496.401-496.426; Ga. Code Ann. §§ 43-17-2-43-17-9 et seq. (2000); Haw. Rev. Stat. §§ 467B-1-467B-14 (1993); Iowa Code §§ 13C.1-13C.8 et seq. (1993); 225 Ill. Comp. Stat. 460/0.01 et seq.; Ind. Code §§ 23-7-8-1-23-7-8-9 et seq. (1999); Kan. Stat. Ann. §§ 17-1759-17-1775 et seq. (1989); Ky. Rev. Stat. Ann. §§ 367.650-367.670 (1994); La. Rev. Stat. Ann. §§ 51:1901-51:1909 (1997); Me. Rev. Stat. Ann. tit. 10, §§ 9-5001-9-5016 (1999); Mass. Gen. Laws. ch. 12, §§ 8-8M and ch. 68, §§ 18-35; Md. Code Ann., Bus. Reg. § 6-101 et seq. (2000); Mich. Comp. Laws §§ 400.271-400.294 (1975); Minn. Stat. § 309.501 et seq. (1996); Mo. Rev. Stat. §§ 407.450-407.469 (1986) and Mo. Code Regs. Ann. tit. 60, § 60-3.010 et seq.; N.C. Gen. Stat. § 131F (1994); N.H. Rev. Stat. Ann. § 7:28-c (2002); N.J. Stat. Ann. §§ 45:17A-1-45:17A-40 (1994); N.Y. Exec. Law § 171-a et seq.; Ohio Rev. Code Ann. §§ 1716.01-1716.99 (1999); Okla. Stat. § 552.1 (1999); Or. Rev. Stat. §§ 128.801-128.995 et seq. (1991); 10 Pa. Cons. Stat. §§ 162.1-162.24 (1990); R.I. Gen. Laws § 53.1-1 et seq.; S.C. Code Ann. §§ 33-56-10-33-56-200 et seq. (2000); S.D. Codified Laws §§ 37-30-137-30-29 (1991); Tenn. Code Ann. §§ 48-101-501-48-101-522 (1996); Utah Code Ann. §§ 13-22-1-13-22-23; Va. Code Ann. §§ 57-48-57-69 (2002); Wash. Rev. Code §§ 19.09.010-19.09.915 (1993); Wis. Stat. § 440.41-440.48 (1999) and Wis. Admin. Code § RL 5.01; W. Va. Code §§ 29-19-1-29-19-15b (2001); N.D. Cent. Code §§ 50-22-01-50-22-05 (1999); Okla. Stat. tit. 18, §§ 552.1-552.18 (1999).

state of the national economy creates large swings as well, as do specific events. (As a result of the terrorism on September 11, 2001, almost half of HBC's clients incurred a severe decrease in fundraising as many people focused their political donations elsewhere.)

Even the same issues vary as to their public appeal (and resulting CFR) over time. Imagine fundraising for highway beautification projects before the anti-littering campaigns in the early 1950's. Our hypothetical Kurdish organization's CFR would greatly improve once the reasons for the U.S. and British no-fly zones (designed to protect the Kurdish population in Iraq) became the subject of national media attention.

Dramatic changes can occur even weekly. HBC was hired by the Committee to Reelect Paul Wellstone in March of 2001. The list of people to call was a "dead" list consisting exclusively of those who had not responded to two earlier mailings. HBC could not know whether the amount raised would cover the cost of calling people who had already failed to respond.

As it turned out, between the start of the calling and the end of the campaign, the net received for the client, after expenses, changed from one-third of the gross amount received to three-quarters. During that period of time, what should HBC have told people the CFR was? The calling for Senator Wellstone's campaign had other purposes besides raising money, of course, including raising volunteers – over 200 active volunteers in this instance. Calling that "dead" list produced almost $1 million for that campaign but there were many other benefits.

A valuable part of a telephone canvass for any organization is the member and donor feedback. Many HBC clients include survey-type questions as part of the calling. When this happens, HBC revises downward any projections about fundraising because of the extra time spent on each call.

As one would imagine, the callers become quite expert on which issues members support wholeheartedly and which they disagree with or are only lukewarm about. This feedback is essential to guide organizations' agendas. Debriefing callers regularly is an indispensable procedure for a non-profit but this valuable feedback costs money and further increases the CFR.

Under these circumstances, what is a "good" CFR? What may be one Attorney General's conception of an acceptable CFR at one time may not be another's a short time later, or even at the same time. Your calling for the pro-Kurdish organization would be continually under threat of penalties but what could you do to avoid them? Call more, call less – neither would have any effect on your CFR. And telling people about your cost of funds ratio or its meaninglessness only serves to increase it.

In your new pro-Kurdish organization, it would be likely that for a long time every nickel of funds would go just to winnowing for a large, sympathetic membership list. And you have no funds to begin. What you need is for the fundraiser to take a chance on you. Let the fundraiser pay the payroll and expenses for a large calling effort and then recoup the expenses and fees later from the larger organization that such calling might build. So, you can guarantee by contract with the fundraiser that 15% of the

funds raised will be directed to the organization regardless of whether they are needed to pay the calling expenses.

At 85% the fundraiser might lose money or eventually make money, depending on what people think about your Kurdish cause. Without such a guarantee, the calling has to pay for itself and is likely to fail at first. With such a guarantee the professional fundraiser takes the risk that the calling won't pay for itself but promises to call anyway. This is just what you would need if you are ever to get sympathy for a Kurdish homeland and want to minimize the risk of the entire awareness effort aborting early for lack of cash.

2. The CFR Is Meaningless And Irrelevant.

HBC has not chosen an unrealistic hypothetical to make its points. The hypothetical is the norm, not the exception. HBC's client, Citizens Campaign for the Environment ("CCE"), for example, provides important leadership in the area of water quality, waste management and public health.[5] That non-profit has been working on specific water issues since 1985 and it has valuable accomplishments to its credit, many of which are revealed on its website.[6] CCE is and ought to be proud of what it has accomplished. (The executive director of CCE is a former New York State Water Commissioner, holds five academic degrees, including an M.S. degree in Water Resources Management from Texas A&M University and is a lawyer.

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[5] www.citizenscampaign.org

[6] *Id.*

About a dozen paragraphs of New York State's water protection code have been written by CCE technical staff.)

When HBC employees call New York citizens on behalf of CCE, they promote legislation, request letters to legislators, renew memberships, inform the public of latent threats to or mismanagement of their local water resources and explain what can be done locally. Funds are usually solicited in the call, but the information exchanged in the telephone call is, as often as not, the primary purpose for the call. The request for funds in a call enables the next call.

The funds also pay for the salaries of CCE staff who sit on or monitor local water quality commissions and the like and do the legwork, research, and administrative work, and lobbying of the organization. The track record is good, the organization is valuable, fraud is not involved, and donations are voluntary. HBC's calling for CCE is similar to a get-out-the-vote campaign where the fundraising is for the calling; the calling is not for the fundraising.

Some of the most important threats to public health are the least glamorous for fundraising. If the Kurdish predicament seems like a far-fetched or difficult issue about which to call people, then try calling on sewer and wastewater issues as CCE must do.

The CFR for organizations with causes like these are truly unknowable because the very concept silently assumes that raising funds is the ***only*** purpose of calling. No one should have to worry about such a bankrupt, nonsensical concept.

With organizations like CCE, what is a "good" CFR? If CCE's members are satisfied with its operation, does

anything else matter? To come up with a figure for the CFR, no matter what it might be, would be misleading because that would falsely imply that the ***sole*** purpose of the calling is fundraising. This may be the case for some charities but is almost never the case for pure political organizations or candidates. Many charities have a legislative agenda or a public education mission and their CFR reflects that mixed use of their funds.

Churches routinely claim a CFR of well under 10%. Yet they pay their clerics, provide them parsonages, and define a large part of their clerics' duties to raise funds. Should religious leaders be compelled to disclose the church CFR before they pass the collection plate? And how shall that CFR be calculated?

Some organizations brag that they do not hire professional fundraisers. The AARP does this in its *amicus* brief in this case. Mostly what that means is that they hire fundraisers (which they label "development directors") in house on their own payroll. But these people perform essentially the same fundraising service at the same cost. They maintain the donor lists, make the contacts, update the records, file the registrations and financial statements with the States and everything else other organizations hire outside private firms to do. In Petitioner's Illinois' lexicon, they "keep" the same percentage of the donations as if these functions were outsourced to HBC or any other professional fundraiser.

Remarkably, all of the Petitioner's arguments would apply in the case at bar if VietNow got 25% of the donated funds, or 60% or 85%. Under Petitioner's proposed definition, ***all*** such fundraising efforts would be fraud. Who would determine what percentage is evidence of fraud and

what percentage is not? Will juries be instructed to take into account the age of the organization, the popularity of its causes, which fundraising expenses were out-sourced, and so forth? Who would risk calling under such an unspecific, vague, and harsh threat?

VietNow or its fundraiser might have committed serious fraud in countless ways. But their CFR is among the least likely ways of measuring or preventing it. The CFR concept is a persistent, irrelevant, and pernicious meme. Failing to mention it when calling is the only honest thing to do.

3. The Burden And Chilling Effect On First Amendment Activities Is Intolerable.

It's a free country. But HBC is not free just to pick up the phone and call people to advocate for its clients. The States and the Federal government have an array of consumer protection laws that contain a myriad of confusing and inconsistent requirements.

HBC does not have to wonder whether the cumulative burden of these requirements chills protected speech. It experiences that chill first hand, every day. HBC routinely decides not to call into States where the burdens of compliance with consumer protection are too great. HBC also refuses to accept clients where the price of these well-meaning but overly-protective regulations is just too high. The result is that the residents of the affected State just do not get to participate in whatever cause is currently at issue.

For example, Kentucky requires a written filing before calling.[7] The filing requires HBC to list (in conviction search and related forms) the name, address, Social Security numbers, and description, including identifying birth marks and tattoos of each of the University of Nebraska students that HBC hires to call into that State. When calling, callers must use their actual names (frightening to many young female callers). The language of the Kentucky requirements (and many other States) is so harsh and threatening that, in fact, the administrative assistant who used to handle most of HBC's filings became afraid for her liberty (penalties for inaccurate filings include incarceration) and HBC had to hire an attorney – at a cost of about 25% of the net fundraising receipts – to handle the intimidating state pre-registrations. No fraud was at issue or alleged – the attorneys were needed just for the red tape.

Of course, the HBC clients, themselves, must also register State by State before calling, and they also routinely hire lawyers to guide them through that process. (If you have the idea that you want to call people to help free the Kurds, you better plan on weeks or months of paperwork, notaries, bonds, balance sheets, audits and the like.)

Of course, no one wants to spend valuable donated resources challenging these regulations. It is easier for the client and the fundraisers just to avoid the harshest States such as Kentucky, if possible.

National Citizen Action – a now inactive public-interest citizen organization – was an HBC client concerned with environmental issues and often intervened in

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[7] Ky. Rev. Stat. Ann. §§ 367.650-367.670 (1994)

public utility rule and rate making. It had to abandon its efforts in Kentucky in 1994 because that State's registration process was just too costly and time consuming. Every time it hired a new canvasser, or one left, it had to amend its Kentucky registration. And it was almost impossible, and therefore risky, for them to make the estimates that were required as to what their gross receipts and net receipts would be in the next fiscal year.[8]

No Kentucky residents complained that they were being left out of the national debate on important civic topics, but then no non-profit could afford to call to warn them about that issue either.

According to the relevant Georgia Statute, any professional fundraiser who raises more than $50,000 in the state must file a certified financial statement prepared by an independent certified public accountant, duly registered and in good standing.[9] Because HBC raised more than $50,000 for a client back in 1994, Georgia will not let HBC register or call until it provides Georgia with this audited financial statement. Georgia NARAL, a non-profit advocacy group concerned with abortion issues, wanted to, but could not, use HBC callers because of this regulatory burden. The cost for an audit then was about $12,000, about half what the organization was expecting to raise. The size of this non-profit's membership surely reflects this setback.

In New York, the relevant legislation requires a $10,000 bond and an $800 annual registration fee, and an

[8] *Id.*

[9] Ga. Comp. R. & Regs. R. 590-9-2-.02

$80 annual per caller fee as a prerequisite to HBC's advocacy-type calling.[10] HBC was asked to help Defenders of Wildlife, a non-profit advocacy group concerned with saving wildlife at risk by, for example, fighting against liberalizing changes to the Endangered Species Act.[11] Even if HBC had registered only 50 of its callers per year, that would be $4,800 in fees as well as the bond. According to the Charities Bureau of New York, HBC would have to send in $3,200 in registration fees as well as a bond for each year, 1996 through 1999, before HBC could even register for the current year.

Needless to say, the Defenders of Wildlife will have to find some other way to update New Yorkers about how they can help reduce the risks to dolphins and wolves. New York has made sure there is no telephone fraud by simply eliminating the telephone calling. This is not unusual.[12]

There is irony here. The greatly increased cost of complying with such rigorous consumer protection only makes the affected organizations more attractive targets for Attorney Generals focused on the proportionally increased CFR.

[10] N.Y. Exec. Law § 171-a et seq.

[11] www.defenders.org

[12] See Tenn. Code Ann. § 48-101-503 (1996) (Tennessee, $25,000 bond and $800 fee); S.C. Code Ann. § 33-56-30 (2000) (South Carolina, $15,000 bond and $50 filing fee); N.C. Gen. Stat. § 131F (1994) (North Carolina, $20,000 bond and $50 filing fee) Utah Code Ann. § 13-22 (Utah, $250 filing fee, and the bank funds must be deposited physically in Utah).

Unfortunately, the pre-calling registration, the fees, the bonding, and the audits, are only the beginning. There are also separate rules compelling what must be said during the calling itself. These rules are difficult to follow because calling relative strangers by telephone and trying to engage them in a conversation about sewers or endangered dolphins is, by nature, a process in which the caller does not have a great deal of control over how long the call will last. Think "click".

In Colorado, for example, in addition to pre-calling registration, the law requires HBC's paid canvassers to state during the call the fact that they are paid canvassers, whom they are working for, which organizations they are calling for, whether any contribution would be tax deductible, and, if requested, the CFR and the registration numbers of the organization and of HBC.[13]

But there's more. If a caller has managed to survive all the Colorado affirmative disclosures without a hang up, brand new Federal Trade Commission regulations require that, if any funds are asked for, callers "promptly" state that "***the*** purpose" of the call (as if there were only one purpose) is to solicit a donation.[14]

Assuming you had properly registered, bonded, and paid your fees before calling, would you choose Colorado as a place to start your awareness message about the Kurds? In Colorado, and many other states, it would be easier to ride horseback through the streets shouting about them.

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[13] Colo. Rev. Stat. § 6-616-105.3.

[14] See 16 C.F.R. 310.4(d).

Illinois is not satisfied with its current statutory scheme. It wants the right to subject fundraisers and callers to the *in terrorem* effect of a *post hoc* determination that, in addition to everything else they must or want to mention, they should have also talked about the expected CFR they were creating. Callers need to allocate some of the precious time they have on the phone to the actual message. Calling for grassroots organizing is already over-regulated. Asking HBC and its clients to guess, client by client, issue by issue, month by month, whether their expected CFR's must be mentioned in the few seconds they are allowed to talk to people on the phone is an intolerable chill on free speech – especially when added to the extant burdens, risks and costs – even if the CFR information were meaningful.

Why does Illinois pick only on the CFR? Surely there are more important things that also need to be disclosed. For many local organizations, half of what is raised must go to the national organizations of which they are only a chapter. Shouldn't that be disclosed?

Wouldn't the following disclosures be just as fraudulent if omitted: "This organization is only two weeks old and has no real track record of success at anything." For our pro-Kurdish organization the callers better affirmatively disclose – after all the other governmentally required messages – "This organization is still quite small and has failed, so far, to convince any governmental officials or U.N. representatives to support the concept of a Kurdish homeland." Or for any given religious solicitation, "This religion's teaching of a heavenly reward for your donation cannot be confirmed."

Here is the point: Please do not let the government retroactively select what information speakers should have disclosed. There would be no stopping this arbitrary picking and choosing and callers would be pressed to try to include a full verbal prospectus into the 30 seconds that the average phone call lasts – if they try to call at all.

4. The Government Is Not A Neutral Referee.

Attorneys General are not the only elected officials in a position to charge fraud for failing to mention a CFR during telephone calls. HBC and its clients are also faced daily with the well meaning zeal of the Federal Trade Commission, secretaries of state, district attorneys, city attorneys and other officials of all sorts. In a broad campaign, such as the calling for former U.S. Senator Paul Wellstone, this meant dealing with hundreds of governmental officials, each with the power to charge fraud if, in his or her opinion, the CFR was not mentioned during the phone calls into his or her jurisdiction.

These public officials have power and many are not afraid to use it. Not all zeal is well meaning. In 1991, HBC was trying to help National Campaign for the Environment (an affiliate of CCE with a similar grassroots program) build its membership in South Carolina. Their plans came to a halt when the Secretary of State and the Attorney General of that State refused NCE's pre-calling registration forms and insisted that all calling immediately cease. The State officials threatened criminal enforcement (for calling without pre-filing).

The reason offered by the officials was a predictably large CFR. They insisted that no funds would leave the State for an out-of-state organization on their watch. And

the officials publicly campaigned for re-election on that issue.

Only when the officials were personally sued in Federal District Court under 42 U.S.C. § 1983 for a denial of civil rights (and after their staff were privately assured that the "biodiversity" the callers were talking about had nothing to do with the civil rights movement) did they finally relent and allow South Carolina residents access to NCE's membership and program. No fraud, just a high CFR and two years of federal litigation.

The power sought by Illinois in the case at bar is not only too vague and too hazardous to the rights of legitimate organizations and their members, the power is wielded by far too many politicians to be predictably employed.

Sometimes the calling is about the government, itself. In 2000, some of the residents of Brooklyn Park, Minnesota learned that their City Council was about to approve a zoning change that would have allowed a favored developer to build a huge outdoor amphitheater in the middle of a residential zone in that city. The City Council was convinced that the City was starved for culture and needed such an amenity. The residents in the zone were convinced it would be a nuisance and produce nightly noise pollution.

With only a few weeks notice, the residents had to get the word out throughout the zone that the City Council's vote on the zoning change was coming. There was no time, no money, and not nearly enough volunteers to notify everyone affected. So, the neighbors quickly formed a non-profit corporation and hired HBC to call and tell the

thousands of homeowners about what was to happen in their part of the city.

The HBC callers, playing Paul Revere, called the affected residents one-by-one, told them about the issue, about the critical upcoming City Council hearing just weeks away, about whom they could contact to get more information or lobby for a different result, and asked for a check so the calling could continue. No other means of contacting so many residents was available on such short notice.

As one might guess, the CFR was 100%. All funds were used, as rapidly as possible, to make more calls (HBC charged its expenses, plus 7%). The project was extremely controversial and the amphitheater was never built. But whether or not it should have been is not the point. The point is that had the City Attorney been allowed to, he would have threatened or begun a prosecution claiming that the out-of-State professional fundraiser, HBC, was fraudulently "keeping" all the money without saying so during the calling.

CONCLUSION

When an organization represents that its funds are used for a specific purpose, everyone understands that not every dollar will be devoted directly to that purpose – that some funds will have to be used for calling expenses, copying, salaries, fees and the like. Everyone also appreciates that some causes are more popular than others. They therefore already know what is necessary to realize that a large CFR does not automatically indicate fraud. But the myth of the big, bad CFR endures.

It is not fraud to be unpopular and have large expenses. It is quite normal. The government should not oblige a non-profit to divide its overhead by its popularity and then make the organization orally report the resulting arbitrary fraction to everyone. Much of the time the data is not even available or is in flux anyway.

The government (all of them) already has the power to pursue non-profits for fraud. Requiring oral CFR disclosures adds a substantial, unnecessary, and illogical burden on those who are just trying to improve things for the rest of us.

There is no denying that older, evolved organizations which have long cultivated their message and their membership lists and have attracted large numbers of volunteers will have a characteristically small CFR. They are the lucky ones. However, a small CFR is not the *cause* of their survival and prosperity, it is only the *result* of those things. And it certainly does not mean those organizations are fraud free.

A large calling CFR might indicate a start-up organization, a membership drive, a difficult or unpopular message, a political-type canvass or many other things, but not necessarily deception.

Each organization must be judged by what it was trying to do and how it tried to do it. There is no universal fraud index.

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Respectfully submitted,

THOMAS H. GOODMAN
ANTHONY J. GLEEKEL
Counsel of Record
SIEGEL, BRILL, GREUPNER,
DUFFY & FOSTER, P.A.
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
(612) 339-7131

Attorneys for Amicus Curiae Hudson Bay Company of Illinois, Inc.